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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SCOTT MATTHEW HILL,

Defendant and Appellant.

B232579

(Los Angeles County
Super. Ct. No. TA109260)

APPEAL from an order of the Superior Court of Los Angeles County.
Eleanor J. Hunter, Judge. Affirmed as modified.

Gerald Peters, under appointment by the Court of Appeal, for Defendant
and Appellant.

No appearance for Plaintiff and Respondent.

An information, dated December 7, 2009 and amended by interlineation on February 25, 2010, charged Scott Matthew Hill with three counts: (1) sexual penetration while the victim was unconscious of the nature of the act, which was known to him (Pen. Code, § 289, subd. (d))¹; (2) dissuading a victim from prosecuting a crime (§ 136.1, subd. (b)(2)); and (3) stalking (§ 646.9, subd. (a)). According to the preliminary hearing transcript, all three counts related to Hill's conduct in digitally penetrating the vagina of his former girlfriend and mother of his five children, Y.B., without her consent while she was sleeping, leaving her a message after his arrest to "drop the charges, bitch," and calling her repeatedly and attempting to find her. Hill pleaded no contest to stalking as charged in count 3. The trial court dismissed the remaining two counts, suspended imposition of sentence and placed Hill on formal probation for five years. As conditions of probation, the court directed Hill to obey all laws and not to come within 200 yards, or to have direct or indirect contact, with Y.B. or their children, subject to any order of the family law court that might allow him to visit the children.

On April 7, 2010, the trial court denied Y.B.'s request for removal of the stay-away order. Y.B. made another request on May 10, 2010, which the court also denied, stating, "Victim's request to remove stay away order is denied due to the nature of the case and the history of the defendant and victim." Ultimately, on August 10, 2010, on Y.B.'s request, the court modified the stay-away order to a civil restraining order prohibiting Hill from harassing Y.B. On February 7, 2011, based on the People's motion, the court made a preliminary finding that Hill had violated probation and revoked his probation. It scheduled a formal probation violation hearing for March 18, 2011 and continued it to April 20, 2011.

At the probation violation hearing on April 20, 2011, Y.B. testified that she and Hill had five children together and had been together about 14 years. Y.B. sought to modify the stay-away order against Hill, which the trial court did in August 2010, because she and her children were living in Hill's father's trailer park home, Hill had

¹ Statutory references are to the Penal Code.

been released from jail and she and the children would have no place to stay if Hill were unable to have contact with them. Y.B. considered her relationship with Hill over, but was living in his father's home because she had nowhere else to stay.

Hill returned to his father's home in the month or two before modification of the stay-away order, and Y.B. and Hill used methamphetamine on a daily basis. Hill also got drunk every day. "It went along with . . . using [methamphetamine]." When Hill was using the drug and drinking alcohol, he belittled and degraded Y.B., calling her names, and "[a]t times it would move to pushing and shoving" her. She sometimes called him names and pushed him in defense. On one occasion Hill slammed her wrist in the door several times when trying to prevent her from leaving the home, causing a lasting bump on her wrist. Other times, he screwed the door shut so she could not enter the home. Hill also cut telephone lines to prevent her calling from the home and smashed "probably six" of her cellular telephones.

Hill and Y.B. argued about sex. According to Y.B., Hill "was wanting to have sex around the clock, all the time, and I would not want to be having sex. I would fall asleep in the living room and wake up to him taking my pants off or carrying me in the bedroom. I would say 'no,' and it wouldn't be okay; he would not leave me alone until I would give in. So it was generally easier just to give in and try to avoid where it was going to go[.]" If Y.B. did not give in to Hill, she "would usually end up with [her] stuff out on the street. Or he would get mean and he would take it out on [her] or the kids. Or he would toss [her] stuff out the window. Or . . . he would tell [her] 'shut up,' he was just going to get another girl. He didn't care. He didn't care. He wanted sex every day. Every day. And [she] didn't want to have sex at all. And [she] would wake up with [her] pants off, and he'd be done or he would . . . jack off right over [her] while [she] was asleep, and he didn't even care." Sometimes she awoke to find his fingers inside her vagina.

Hill and Y.B. also argued about discipline of their children. Shortly before modification of the stay-away order, their 10-year-old son called Hill's friend a derogatory name. Hill spanked the boy, while he was bent over with his pants removed,

using a leather belt with a buckle “again and again” and leaving bruises “from above his back, the lower back, all the way down to the middle of his knees[,]” which lasted for more than a month. After modification of the stay-away order, the same son was “acting up” one day, “throwing one of his tantrums[,]” and Hill tried to scare him by putting a drill to the boy’s chest while he was on his back on the hallway floor and pulling the trigger. The drill did not go into the boy’s chest, but left a mark. Hill also “physically hit [their five-year-old daughter] in her face, knocked her down in the laundry room.” Hill “used more force than necessary. Definitely more force than necessary. It did cause her to hit the ground, and it did cause her face to instantly swell up.” Hill became upset when Y.B. took pictures of their daughter’s face. Hill also pulled their daughter’s hair so much that the hair came out and was in her pocket.

Hill and Y.B.’s 10-year-old son testified that his father put a drill to his chest, spanked him with a belt, hit his sister in the face and screwed the door shut so his mother could not get in the home. The boy also said that, when Hill drinks beer, he “[h]its people for no reason and stuff.” The boy saw his mother run to the bathroom with no pants on telling Hill to ““stop it.””

Hill and Y.B. fought during the Thanksgiving and Christmas holidays of 2010, and on New Year’s Day Y.B. awoke to find a pair of her daughter’s soiled, potty-training pants on her head. Her 10-year-old son saw his father put his sister’s “poopy panties on [his] mom’s face.” During arguments, Y.B. sometimes threatened Hill that if he did not stop then she would call the police, and “way more than once” she did call the police, who came out to the home. Hill told Y.B. that, “[i]f he ended up in jail, [she] was going to have no place to live and he was going to make sure that [her] kids [were taken] from [her] for good.”

After the holidays, a social worker helped Y.B. and her children move from the home. Despite the move, Hill began contacting Y.B., and she called the District Attorney’s Office. According to Y.B., she has been sober since January 3, 2011, and she “now ha[s] [her] own home, and [she] and [her] kids are happy. [They] have a dinner

table that [they] sit down and eat at every night. And [they] have never done that before. It's awesome.”

Hill's neighbor testified in his defense that she often saw Hill in the trailer park with his children. She never observed him yelling at or behaving aggressively toward Y.B. or their children. Neither Y.B. nor the children appeared afraid of Hill. Y.B. once was walking in the streets talking to herself at 2:30 a.m. Another neighbor testified that she had never seen Hill being aggressive or mean to Y.B. or the children. The trailer park manager testified that he had known Hill for his five-year tenure at the park and that Hill performed general maintenance for him. Hill appeared “just normal . . . nothing out of the ordinary.” The manager never saw Hill displaying aggressive, violent or angry behavior toward Y.B. or their children. Hill's father testified that Y.B. would leave the home, causing him to have to stay with the children, and that he had seen her using drugs.

Hill testified that he had never pushed or hit Y.B. or slammed her wrist in the door. He denied forcing sex with her. He admitted spanking his son but did so for discipline purposes and did not intend to hit his son's back on the occasion when his son called his friend a derogatory name. He also admitted putting the drill to his son's chest, but the event happened years ago when he was not on probation and his son had done it to another of his children and he wanted to teach his son a lesson. He pulled his daughter's hair, but never put it in her pocket. He did not hit his daughter and does not know what caused the bruise on her face. Hill and Y.B. argued a lot, and she moved out because he had called the police numerous times to report that she was using drugs and taking personal property that belonged to him and to his father. Hill participated in anger management classes and for several months tested for drug use as directed by his probation officer.

Based on the evidence, the trial court, finding Y.B. credible and her testimony corroborated by that of the 10-year-old son, concluded that Hill had violated the restraining order not to harass Y.B. and the condition of his probation that he obey all laws. The court determined that Hill had violated his probation, revoked his probation and sentenced him to state prison for three years, the upper term for the stalking charge,

based on the increasing seriousness of Hill's criminal conduct and the nature of the case. The court imposed a protective order of 10 years under section 273.5, subdivision (i), directing Hill not to come within 100 yards of Y.B. or to contact her directly or indirectly. Hill filed a notice of appeal.

We appointed counsel to represent Hill in the matter. After examining the record, counsel filed a *Wende* brief raising no issues on appeal and requesting that we independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.)

On January 20, 2012, we directed appointed counsel to immediately send the record on this appeal and a copy of the opening brief to Hill and notified Hill that within 30 days from the date of the notice he could submit by letter or brief any ground of appeal, contention or argument he wished us to consider. We did not receive a response.

We have examined the entire record and determined that substantial evidence supports the trial court's decision to revoke probation. We may not reweigh that evidence.

In addition to sentencing Hill to state prison for three years, the court issued a protective order pursuant to section 273.5, subdivision (i), under which Hill is not to come within 100 yards of Y.B. or contact her, directly or indirectly, for 10 years. Section 273.5, subdivision (i), provides, "Upon conviction [for willful infliction of corporal injury upon, among other individuals, the mother of his child] under subdivision (a), the sentencing court shall also consider issuing an order restraining the defendant from any contact with the victim, which may be valid for up to 10 years, as determined by the court." Because Hill was not convicted of "inflicting corporal injury," but rather for stalking, the court should have issued any protective order pursuant to section 646.9, subdivision (k)(1), which authorizes the sentencing court for a stalking conviction under that statute to "consider issuing an order restraining the defendant from any contact with the victim, that may be valid for up to 10 years, as determined by the court." We thus modify the judgment to reflect that the 10-year protective order is pursuant to section 646.9, subdivision (k). In all other respects, we are satisfied that Hill's attorney has fully complied with his responsibilities and that no arguable appellate issue exists.

(*People v. Wende, supra*, 25 Cal.3d at p. 441; *People v. Kelly* (2006) 40 Cal.4th 106, 110.)

DISPOSITION

The judgment is modified to reflect that the 10-year protective order issued by the trial court is pursuant to section 646.9, subdivision (k), rather than section 273.5, subdivision (i). As modified, the judgment is affirmed. The court is directed to forward a corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.